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majority gave no reason for dropping its lack of jurisdiction argument, the dissent suggests that the reason stemmed from public policy arguments concerning the stability of titles. It appears that the court did realize the consequences of including this argument in its opinion. Therefore, it would seem that the court ultimately heeded the words of Justice Holmes and proceeded slowly in expressing views affecting such a basic concept as jurisdiction over the subject matter.

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SURVIVING TENANT'S RIGHT OF CONTRIBUTION FOR ENTIRETIES DEBT

Seldom does a legally sound result assume a more unjust appearance than in the situation which occurs when two spouses jointly incur an indebtedness secured by a mortgage on property held as tenancy by entireties, and where one spouse dies, following which the surviving spouse, now owner in fee,[1] asserts a claim against the deceased spouse's estate for contribution of one-half of the mortgage debt. At first glance, it seems inequitable to allow one who has become by survivorship the owner in fee of encumbered land to avoid the full obligation which the land secures.

The Supreme Court of Delaware was confronted with this problem in the recent case of *In re Estate of Keil.*[2] In this case a husband and wife acquired title to a tract of land as tenants by the entirety. A year later the husband executed his will, in which he directed his executors to pay all his "just debts and funeral expenses"[3] out of the estate. The testator bequeathed money to his wife, certain relatives, and certain charitable institutions, one of which was to receive the residue of the estate. The legacy to his wife was to be paid first, then the legacies to his relatives, and then a legacy to one of the institutions. Some months after the execution of the will, the spouses borrowed $8,000 for the purpose of making improvements upon the entireties property. The debt was evidenced by a joint and several bond, and was secured by a mortgage on the entireties property. Soon afterward, before any of the debt was paid, the husband died, and proceedings were instituted

[1]"The most important incident of tenancy by entireties is that the survivor of the marriage, whether the husband or the wife, is entitled to the whole . . . ." 2 Tiffany, Real Property § 430 (3d ed. 1939).

[2]145 A.2d 563 (Del. 1958).

[3]Id. at 564.

for the purpose of distributing the assets of his estate. Instructions were sought upon the question of the extent to which the decedent's estate would be ultimately liable for the $8,000 debt; for if it would be liable at all, the funds remaining would be insufficient to pay all of the legacies to the institutions, and the residuary legatee would be paid nothing. The wife contended that she was entitled to contribution of one-half of the debt[4] because she would be forced to pay, when the debt fell due,[5] the whole of a joint and several obligation, and consequently she should be reimbursed for an expenditure that would erase the obligation of her co-debtor. The trial court, which had denied contribution, was reversed by the Supreme Court of Delaware in a two-to-one decision.

Thus Delaware joined Indiana,[6] Maryland,[7] North Carolina,[8] New Jersey,[9] Pennsylvania,[10] Tennessee,[11] and Virginia[12] in enforcing a deceased spouse's joint and several obligation against his estate, even when all benefits of and title to the land securing the debt pass to his spouse by survivorship.[13] Jurisdictions which deny contribution are

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[4]She initially contended that she should be excused from any payment on the grounds that (1) the will expressly provided that all just debts were payable out of the estate; (2) the debt did not exist at the time of the will's execution, and therefore he intended for her to have the land unencumbered; and (3) she only received $35,000 out of a $122,000 estate, and that consequently he could not have intended this proportionately small sum to be diminished by payment of outstanding debts. The court found, however, that the "just debts" clause was a standard provision and merely declaratory of the law, and that no language in the will supported the wife's other contentions. 145 A.2d at 564.

[5]Technically, the right to contribution cannot be asserted until one has actually paid funds, and thus changed his position by extinguishing or diminishing the obligation of his co-debtor. 13 Am. Jur. Contribution § 7 (1938). But it is well settled that no legacies should be paid out of the estate until the decedent's debts are first met. 2 Glenn, Mortgages § 304.1 (1943). The parties to the Keil case agreed that if the wife had a right to contribution, that right was to be asserted immediately. 145 A.2d at 566.

[6]Magenheimer v. Councilman, 76 Ind. App. 583, 125 N.E. 77 (1919).

[7]Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930).

[8]Montsinger v. White, 240 N.C. 441, 82 S.E.2d 362 (1954); Underwood v. Ward, 239 N.C. 513, 80 S.E.2d 267 (1954); Wachovia Bank & Trust Co. v. Black, 198 N.C. 219, 151 S.E. 269 (1930).

[9]Nobile v. Bartletta, 109 N.J. Eq. 119, 156 Atl. 483 (1931).

[10]In re Dowler's Estate, 368 Pa. 519, 84 A.2d 209 (1951); In re Kershaw's Estate, 352 Pa. 205, 42 A.2d 538 (1945). In the Kershaw case, one-half of the amount of a debt secured by a mortgage on entireties property which passed to the survivor was held deductible as a debt of the estate for tax purposes.

[11]Newson v. Shackelford, 163 Tenn. 358, 43 S.W.2d 384 (1931).

[12]Brown v. Hargraves, 198 Va. 748, 96 S.E.2d 788 (1957).

[13]If the land passes by will or intestacy, quite another situation is created. At common law and in many jurisdictions today, the law "favors the heir," in that an heir or devisee of a mortgaged tract takes free of the encumbrance, absent an ex-

New York,[14] Florida,[15] and Massachusetts.[16] It is submitted that the Delaware view is the sound one.

When a husband and wife execute a joint and several note, each becomes liable for the entire amount,[17] but if one is forced to pay more than his or her proportionate share, then he or she is entitled to contribution from the other.[18] The death of one of the parties does not disturb this relationship, and the party entitled to contribution may assert his right against the estate of the deceased co-debtor.[19] Why should this deep-rooted principle be deemed inapplicable merely because of the nature of the collateral securing the debt?

The dissenting judge in the *Keil* case favored the denial of contribution, using the following reasoning: contribution is a right which sounds in equity and is based on equitable principles of natural justice.[20] To allow the survivor to acquire title to the land without discharging the entire debt is to bestow upon her the full value of the land in addition to the value of one-half of the debt, thereby unjustly increasing her equity by the amount of one-half of the debt.[21] By such a result "the widow would receive a windfall or unjust enrichment, to which she would not be equitably entitled."[22]

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pressed intention to the contrary, and the estate alone is liable. 2 Glenn, Mortgages § 302 (1943). The heir or devisee was never liable on the debt, whereas in the instant case the survivor was initially jointly and severally liable.

[14]Geldart v. Bank of New York & Trust Co., 209 App. Div. 581, 205 N.Y. Supp. 238 (2d Dep't 1924); Robinson v. Bogert, 187 Misc. 735, 64 N.Y.S.2d 152 (Sup. Ct. 1946); In re Dell's Estate, 154 Misc. 216, 276 N.Y. Supp 960 (Surr. Ct. 1935).

[15]Lopez v. Lopez, 90 So. 2d 456 (Fla. 1956).

[16]Ratte v. Ratte, 260 Mass. 165, 156 N.E. 870 (1927).

[17]2 Williston, Contracts § 320 (rev. ed. 1936).

[18]In re Estate of Keil, 145 A.2d 563, 565 (Del. 1958) (dictum); 2 Williston, Contracts § 345 (rev. ed. 1936). The right of a cotenant, who discharges an encumbrance upon the common property, to rateable contribution from his cotenants has been said to arise from the trust relationship which exists among co-owners of property. "But whatever may have been its origin, the doctrine is firmly established by the authorities...." Grove v. Grove, 100 Va. 556, 42 S.E. 312, 314 (1902).

[19]2 Williston, Contracts § 345 (rev. ed. 1936).

[20]This statement implies that contribution is not based on contract. This is correct, but if a contract exists, it may determine the existence and amount of contribution. 2 Williston, Contracts § 345 (rev. ed. 1936).

[21]The dissenting judge in Keil states it thusly: "Prior to the death of her husband each cotenant... owned the property in question subject to a mortgage of $8,000. Assuming that the property was worth $20,000, there was an equity of $12,000. If the widow now should pay off the full amount of the mortgage, as I think she should, the amount of the equity would remain unchanged. However, if she should be permitted to compel the estate of her deceased husband to pay off one-half the amount due under the mortgage, or $4,000, she would then own the property subject only to a lien of $4,000, giving her an equity of $16,000 instead of $12,000." 145 A.2d at 567-68. See 13 U. Pitt. L. Rev. 763, 765 (1952).

[22]145 A.2d at 567. "[T]he doctrine of contribution rests on principles of equity

What the dissent in fact does is to impose the incidents of the estate upon which the security is held on the money obligation itself. Such an approach judicially creates a *debt by the entirety,* with the incident of survivorship, when survivorship was not expressed or implied in either the debt contract or the mortgage deed.[23] The law recognizes a presumption that when a decedent was bound on an obligation while living, his personal representative is likewise liable at his death.[24] Even though this presumption remained unrebutted in the principal case, the dissent would relieve the estate from payment of any part of the debt. This result can be reached only by invoking vague notions of "natural justice" which fly in the face of a valid, enforceable contract obligation.

The better view, as asserted in the *Keil* case, is that "the right of contribution flows from the debt, not from the mortgage lien. The incidental existence of collateral in the hands of the creditor is... immaterial in enforcing this right."[25] The court correctly refused to allow the incidents of the collateral to eclipse the true nature of the transaction. "This is the ordinary case of a joint debt, contracted by both parties for their common benefit..."[26] with the result that "the estate of the deceased debtor is liable to contribute one-half of the debt."[27]

The dissent, however, reasons that it is unjust to bestow upon the survivor both the fee and the benefit of being relieved of one-half of the money obligation. But it acknowledges the fact that the right to contribution "is a matter resting entirely between the joint debtors."[28] If, then, the relationship between the joint debtors controls, why should the deceased spouse's money obligation be released, when

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and natural justice and will not be applied where these are lacking or where... inequity and injustice result." In re Dowler's Estate, 368 Pa. 519, 84 A.2d 209, 212 (1951) (dissenting opinion).

[23]This erroneous extension of the doctrine of survivorship, necessarily employed by the dissenting judge in Keil, is also proposed by the dissenting judge in In re Dowler's Estate, who asks the following question: "Is it not logical and just that a joint obligation of a husband and wife arising directly out of the entireties property should be considered as between husband and wife to be an entireties obligation?" 84 A.2d at 212. But does the joint obligation arise directly out of the collateral?

[24]In re Traub's Estate, 354 Mich. 263, 92 N.W.2d 480, 482 (1958); Chamberlain v. Dunlop, 126 N.Y. 45, 26 N.E. 966, 967 (1891); Kernochan v. Murray, 111 N.Y. 306, 18 N.E. 868, 869-70 (1888); Am. Chain Co. v. Arrow Grip Mfg. Co., 134 Misc. 321, 235 N.Y. Supp. 228, 233 (Sup. Ct. 1929).

[25]145 A.2d at 565.

[26]Id. at 566.

[27]Ibid.

[28]145 A.2d at 567.

such a release was not contemplated in the debt contract itself? If the debt had been *unsecured,* the surviving spouse would have had little difficulty in exacting contribution from the estate.[29] A debt should not be extinguished solely because it is secured by land to which the surviving joint debtor acquires title by operation of law.

When the spouses acquired the land as tenants by entireties, they voluntarily assented to the peculiar incident of survivorship. Each had an equal chance of surviving the other and of acquiring the fee. It was inevitable that one's chance of acquisition would be extinguished by death. By the original deed which created the tenancy by entireties, the husband bought the enjoyment of the land for his life, and the possibility of acquiring the fee. That this expectancy did not occur does not absolve him from his debt. If the debt had been paid by his wife *during his life,* she would clearly have been entitled to contribution.[30] Why, then, should his death *before* she paid cancel his debt?[31]

The dissent necessarily creates a new type of joint and several money obligation—one which, without an expressed or implied intention by the parties, compels payment by the survivor in the event that he or she acquires title to the *collateral* by survivorship. This result is reached ostensibly to prevent unjust enrichment. Instead, it works unjust enrichment in that it releases a joint and several obligor from a debt upon which he has paid nothing. Any "unjust enrichment" to the survivor stems from the original entireties deed and not from his right to contribution. What the dissent actually attacks, then, is the notion of survivorship.[32] It is shocking to the dissenting judge that the survivor should acquire the land in fee without also assuming

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[29]Id. at 565; 2 Williston, Contracts § 345 (rev. ed. 1936).

[30]13 C.J. Contribution § 13 (1917).

[31]A comparable situation which is governed by the same principles, and which varies only in degree, occurs when the survivor-to-be pays before the death of his or her spouse, and then upon the death the estate seeks to avoid liability.

[32]"It may be that, because of modern innovations on the common law respecting the property rights of married women, the venerable estate known as estate by entireties has outlived the purpose of its creation and is out of harmony with present conditions. However this may be, if change is desired, it must come through legislative action, and not through judicial construction. This estate is too well established and too well defined to be subject to judicial impairment." Biehl v. Martin, 236 Pa. 519, 84 Atl. 953, 954 (1912).

An excellent survey of legislative impact on estates by entireties is found in Dean Oval A. Phipps' discussion of the subject in 25 Temp. L.Q. 24 (1951).

Creditors of one spouse have the best reason to be critical of the estate, as encumbrances on property held by the entirety will not operate to deprive a cotenant of his right to possession or of his contingent right of survivorship. 2 American Law of Property § 6.6 (Casner ed. 1952).